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No. 91-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether summary judgment was properly denied as to Sherman Act "tying" claims against a trade association and its wholly-owned trade exchange, where access to the exchange is conditioned upon membership in the parent trade association or an affiliated trade association and upon payment of dues for association services unnecessary to exchange functions, and the record demonstrates market power in the market for trade exchange services.

2. Whether summary judgment was properly denied as to a Sherman Act rule of reason claim against a trade association and its wholly-owned trade exchange, where access to the exchange is conditioned upon membership in the parent trade association or an affiliated trade association and upon payment of dues for association services unnecessary to exchange functions, and the record demonstrates market power in the market for trade exchange services.

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SUMMARY OF ARGUMENT

Respondents oppose the petition for certiorari to the United States Court of Appeals for the Eleventh Circuit. That Court's decision was correct and does not conflict with those of either this Court or the other courts of appeal. Indeed, the principal decision of this Court cited by Petitioners supports the result reached below, rather than that urged by Petitioners. There are no special and important reasons for review of the issue posed by Respondents. Finally, review of this action is premature, because unresolved factual issues may prove to be dispositive. This action was remanded for trial.

ARGUMENT

I. Petitioners Show No Conflict with Decisions of This Court.

Petitioners assert that the Eleventh Circuit opinion is in conflict with decisions of this Court. But this Court has never held that a trade exchange may require its members to belong also to a separate membership organization whose functions, and therefore whose charges, are superfluous to the operation of the exchange. This Court did approve trade exchanges whose facilities were open only to members in *Associated Press v. United States*, 326 U.S. 1 (1945);[1]

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[1] *Associated Press* actually *affirmed* a remedial provision in the trial court's preliminary injunction, forbidding limitation of services to members only. It also affirmed the lower court in failing to find the membership limitation a substantive violation of the Sherman Act, but reached that result because of the limited trial record, without prejudice to the district court's re-

and *Anderson v. United States*, 171 U.S. 604 (1898).[2]

This case is fundamentally unlike either *Associated Press* or *Anderson*. In both of those cases, membership organizations required only membership in their own group, as a precondition to access to the exchange; and charged only the membership dues relevant to exchange activities. In this case, by contrast, access to the multiple listing service ("MLS") of Petitioner Metropolitan Multi-List ("Metro") is conditioned not solely upon joining Metro and paying Metro dues and fees, but also upon joining and paying dues to a separate organization altogether, a board of Realtors®. *Associated Press* would be analogous, for example, only if AP had required its members also to join and pay dues to a separate "National Newspaper Guild" affiliate, or comparable trade organization, as a condition of access to AP's services. Because there was no such requirement in *Associated Press*, nor in *Anderson*, those decisions do not support Petitioners' argument.

Petitioners nevertheless argue that access to Metro's services is simply a perquisite of membership in its parent, Petitioner DeKalb Board of Realtors® ("DeKalb"). But the facts demonstrate otherwise. At-

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consideration. 326 U.S. at 22-23. Hence *Associated Press* does not stand for the proposition that members-only rules are always allowed, regardless of the facts of record; even less does it approve membership restrictions which have the effect of excluding competitors of the exchange's members. *See also Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

[2] *Anderson* was decided early in the development of the Sherman Act and before present-day "effect on interstate commerce" jurisdiction, at a time when distinctions between "direct" and "indirect" effects on interstate commerce were thought very significant. The *Anderson* decision reflects that outdated analysis.

lanta area real estate professionals desiring to join a board of Realtors® are required to join not DeKalb, but the local board serving their principal place of business. Defendants' Statement of Uncontested Material Facts ("Uncontested Facts") ¶ 17. Access to Metro does not require membership in DeKalb, but may be secured by joining any of several boards of Realtors® in the metropolitan Atlanta area.[3] Furthermore, members in a board of Realtors® do not gain access to Metro without payment of Metro's separate dues and fees. Pet. at 3.

The Realtor® membership requirement makes Metro's access charges unreasonable. The Realtor® boards provide, and charge for, a host of services not necessary to the functioning of Metro as an exchange. As the Eleventh Circuit noted in this case, Petitioners' "assertion" that Realtor® membership does not entail costly additional services not provided by Metro

> may come as a surprise to the members of the Realtors® who pay several hundred dollars a year for membership and to the DeKalb Board of Realtors® official who, in an interrogatory, listed 27 services provided by the Realtors® .

(Pet., App. A, at 14a)

A review of the services listed in response to interrogatories[4] confirms that most Realtor® services

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[3] Uncontested Facts ¶ 18; Metro Rules and Regulations, Art. III §1. This home board may even lie outside Metro's service area. (R.3-35 Exh., Ebert dep. of 10/20/88 at 18) (Record citations appear in the form required by the Eleventh Circuit [volume number - document number - page number if relevant]).

[4] Three interrogatory answers are pertinent. Petitioners listed

are not necessary to Metro's functioning. Realtor® services include political action, public education and public relations, and fringe benefits such as access to insurance coverage.

By contrast, Petitioners urge only two limited functions of the Realtors® which support Metro, *i.e.* one ethical rule plus arbitration services. Respondents reasonably should pay for only those two functions, not the full range of Realtor® services.

The Fifth Circuit correctly defined what fees are reasonable; namely those germane[5] to the purposes

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27 services provided by the DeKalb Board of Realtors® ;19 services of the Georgia Association of Realtors® which benefit DeKalb's members; and 17 National Association of Realtors® services which similarly benefit DeKalb's members. (See Appendix A to this brief.) A substantial portion of each local board dues payment goes to the state and national organizations, fully half in the case of DeKalb. (R. 3-35 Exh., Ebert dep. 10/19/89, at 37, 64)

[5] In decisions outside the antitrust area, this Court has found that compulsory fees may be fractionated into the permissible and the impermissible, even when charged by a single membership organization. In *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), interpreting the compulsory union membership provisions of the Railway Labor Act, this Court defined the services for which a compulsory membership group reasonably might charge as those services "germane" to the organization's purpose for existence. *Ellis* further defined those permissible charges as "direct costs" plus "expenses of activities or undertakings normally or reasonably employed to implement or effectuate [those] duties." *Id.* at 448. *See also Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 236 n.33 (1977) ("social activities" must be related to group's purpose). Although *Ellis* interpreted that statute in light of First Amendment objections, the nature of the challenge does not distinguish *Ellis* from this case. *Ellis* expressly adopted broad notions of "germaneness," rejecting a formulation which

of multiple listing services, in *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980):

> [An MLS] must be allowed to establish fee schedules which allow it to recoup its costs of operation and to maintain its viability as a going concern. . . . A sizable membership fee which bears no relation to the[se] cost factors . . . may not only create a significant barrier to new entry into the association, but may create "a strong inference that the amount has been set up as a barrier against" new applications.

Id. at 1386 (citation omitted).

Indeed, the Realtors®' own national rules confirm the principle that the only reasonable MLS fees are those attributable to MLS services or sustenance:

> "Application and entrance fees for participation in a Multiple Listing Service, owned by, operated by or affiliated with a Board of REALTORS®, in excess of the approximate cost, including the accumulation and maintenance of reasonable reserves, of developing, maintaining, or improving the organization as a going concern, is an inequitable limitation on the membership."

Interpretation No. 29 (Adopted Jan. 24, 1961). (R.3-35 Exh.)[6] Because Metro's Realtor® membership requirement imposes fees that bear no relationship to

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would have limited impermissible expenses to the purely political. *Cf. International Ass'n of Machinists v. Street*, 367 U.S. 740, 769 (1961). *Ellis* defines an organization's reasonably chargeable expenses as those relevant to its purpose for being.

[6] NAR's formal interpretations of its constitution and bylaws are binding upon the local Realtor® boards. (R.3-35 Exh., Ebert dep. 10/19/89 at 110)

Metro's functioning, the resulting charges are unreasonable as a matter of law.[7]

Since neither *Anderson* nor *Associated Press* has anything to do with unnecessary charges, nor with requiring membership in still *another* organization in order to get access to the exchange, those decisions do not conflict with the result below.

II. Petitioners Show No Conflict with Decisions of the Courts of Appeals.

A. *Pope* Is Not in Conflict With the Decision Below.

Petitioners argue that *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), is inconsistent with the decision below on the group boycott issues. Yet *Pope*, like *Associated Press* and *Anderson*, does not address the issue of excess fees for unnecessary services provided through compulsory membership in a separate organization.

Pope arose from a unique fact setting, and therefore raised issues different from those raised in the case at bar. The Popes, husband and wife, owned a brokerage that cornered about one-half the local real estate market. The local Realtor® board had charged membership dues only to brokers. When the Popes grew dominant, the Realtors® began charging dues for each agent. The Popes gave up their Realtor® membership when agent fees began to be charged, but later sued for reinstatement based on the former fee schedule, that is, for payment of broker dues alone. As the court stated:

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[7] Alternatively, this Court's review is inappropriate because the record creates **at least** an issue of fact as to reasonableness of these charges, sufficient to resist summary judgment.

> In this case, the only membership requirement that is brought under the scrutiny of the antitrust statutes is the [Realtor®] membership fee schedule that precipitated the Popes' resignation from the board. . . . Our inquiry is limited to determining whether the present [Realtor®] fee schedule is reasonable.

872 F.2d at 130. Thus, the Fifth Circuit in *Pope* was not faced with the issue whether it was reasonable to require payment of fees for non-MLS operations. Because *Pope* concerned only the narrower issue whether Realtor® fees could be charged according to the number of agents in a brokerage, *Pope* does not conflict with the result below.[8]

Indeed, as Petitioners acknowledge, both *Pope* and the decision below were guided by the Former Fifth Circuit's opinion in *United States v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980). In *Realty Multi-List*, the Fifth Circuit held that MLS access limitations must (1) be justified by "competitive needs," and (2) be "reasonably necessary." 629 F.2d at 1375. Reasonable access charges are those "which allow [the MLS] to recoup its costs of operation and to maintain its viability as a going concern." *Id.* at 1386.

Petitioners embrace the *Realty Multi-List* test in some portions of their petition (*e.g.*, Pet. at 4), and in other portions criticize the test as "tantamount to *per se* condemnation of the membership require-

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[8] As if further to emphasize its limited ruling, *Pope* nowhere addresses tying claims.

ment."[9] Although Respondents would argue that such membership requirements *should* be subjected to *per se* condemnation, neither the *Realty Multi-List* case nor the decision below so held. Instead, both decisions expressly adopt a rule of reason approach, requiring that the plaintiff prove market power[10] and allowing the defense of business justification. This rule of reason approach in *Realty Multi-List* has been noted with approval in VII P. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, § 1508 at 403 (1983).

Although artfully framed in the terms of alleged conflict in the circuits, the bulk of Petitioners' argument is that the decision below is wrong and will work substantial hardship upon Metro's operations. These fact-based assertions are both unfounded and premature. The Eleventh Circuit, in remanding the case to the District Court for further proceedings, cogently reasoned:

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[9] (Pet. at 18) Petitioners' hedging in this Court is consistent with their litigation approach below; in the Court of Appeals, they did not challenge the *Realty Multi-List* test, but merely argued that it was "inapplicable." They stated, "*Realty Multi-List* simply does not apply where, as here, the Plaintiffs plainly can satisfy Metro MLS's eligibility criteria. [*Pope*] explained the inapplicability of *Realty Multi-List* when the reasonableness of an MLS's participation eligibility criteria are not at issue." (Petitioners' Eleventh Circuit brief, at 23)

[10] The existence of a factual issue as to market power serves to distinguish both *Realty Multi-List* and this case from several of the decisions cited by Petitioners. "A significant number of the cases that we have found upholding the membership requirements of multiple listing services rest at least in part upon a finding that the service lacked the requisite market power." *Realty Multi-List*, 629 F.2d at 1373 n.40 (citing several of the cases upon which Petitioners continue to rely).

> While the goal of inducing brokers to join the multilist system is a legitimate pro-competitive justification and the "no-solicitation" and arbitration rules are both reasonable and narrowly tailored to that end, this lawsuit is not questioning the validity of those two rules. The question before this Court is whether it is necessary to impose Realtor® membership requirements in order to obtain the same ends. It is clear that the Realtor® membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system. Metro could easily impose its own "no solicitation" and arbitration rules on its members.

Pet. App. at 27a. Petitioners contend, however, that it would be difficult for Metro to adopt its own rules. There is absolutely *no* support in the record for such a counter-intuitive assertion; indeed, Petitioners have admitted Metro's capability to adopt its own internal ethical and arbitration rules.[11]

Finally, Petitioners' argument is empty as a practical matter. The ruling below leaves them with at

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[11] The Defendants agree that it is theoretically possible for Metro MLS, Inc. to adopt rules and regulations, and establish procedures for enforcing those rules and regulations, that parallel the Realtors® Code of Ethics and the duty it imposes upon Realtors® to arbitrate business disputes with other Realtors®." Defendants' Response to Plaintiffs' Statement of Uncontested Material Facts (in support of Respondents' cross-motion for partial summary judgment on the precise issue whether any justification existed for the Realtor® membership requirement at 7, ¶ 5(c)(v)). A cofounder of Metro did not recall Metro's even having ethics or arbitration provisions during a period when it was independent of DeKalb. (R.4-40 Exh., Scott dep. at 14-15)

least two options, each of which would advance the procompetitive aspects of Metro's exchange function without raising the anticompetitive threats of excess charges and exclusion from access. First, Petitioners may continue to rely upon the local boards of Realtors® to provide a non-solicitation rule and arbitration services,[12] and require non-Realtor® MLS participants to pay for those services but no other Realtor® services. Under this alternative, Petitioners need restructure nothing other than to reduce their fee schedules.

Alternatively, Metro may perform those functions itself,[13] or farm them out to non-Realtor® services providers.[14] Under either scenario, Metro members will not be required to pay for non-MLS services.

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[12] This possibility is sufficient response to Petitioners' concern for disruption of organizational "efficiency."

[13] Duplication of the Realtor® "non-solicitation" rule is as easy as putting pencil to paper. Notably, not one of the affidavits submitted by Respondents in support of the alleged necessity of Realtor® arbitration asserts that arbitration *through the Realtors®* is necessary to MLS functioning. Indeed, arbitration through the Realtors® introduces new anticompetitive potential in addition to promoting artificial interdependence. FTC Staff Reports, *The Residential Real Estate Brokerage Industry,* 16, 125 (1983) (hereinafter "FTC Report").

[14] Each of the services touted by Petitioners is provided by others in the market place, and need not be provided through compulsory Realtor® membership. Most obviously, compulsory statutory arbitration by preexisting agreement is available in Georgia even without the Realtor® structure, O.C.G.A. § 9-9-3. Petitioners could require MLS participants to subscribe to compulsory statutory arbitration, and thereby avoid setting up their own arbitration structure.

In short, the facts of record support Respondents' group boycott claim, and there is no conflict between the decision below and *Pope*. Both decisions rest upon the *Realty Multi-List* decision of the former undivided Fifth Circuit, and neither decision challenges *Realty Multi-List*.

B. There Is No Relevant Conflict in the Tying Cases.

1. There Is No Conflict With *Wells*.

Petitioners argue that the decision below somehow conflicts with decisions of other circuits in Sherman Act tying cases. Petitioners cite *Wells Real Estate v. Greater Lowell Bd. of Realtors®*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), as allegedly supporting the proposition that MLS access and Realtor® memberships constitute a single "product," thus defeating a tying claim. But *Wells* specifically refrained from finding an absence of separate products or services. Petitioners omit the language of *Wells* which pretermits determination of that very issue.[15]

Instead, *Wells* relied upon an *absence of actual competition* in the tied product market (*i.e.*, real estate boards). The court stated,

> Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board. . . . The tying

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[15] "We need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above" 850 F.2d at 815. Those reasons are discussed next in the text.

> claim must fail absent any proof of anti-competitive effects in the market for the tied product.

850 F.2d 815.[16] The instant case is quite different. Unlike Lowell with its one professional organization, Atlanta has more than one. Respondent Empire, a direct competitor of the local Realtor® boards, offers Atlantans an alternative professional membership structure. In Atlanta, real estate professionals perceive joining Empire as a viable alternative to joining a Realtor® board.[17] In this case, the *Wells* court would have no difficulty finding that the professional association market has been affected by Petitioners' tying arrangement.

To the extent dicta in *Wells* found no separate products, its analysis is simply erroneous. See *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984). Separate products are created for tying purposes by "a sale involving two independent transactions, separately priced and purchased *from the buyer's perspective*." *Id.* at 20 (emphasis supplied).

> [W]hether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. . . . .

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[16] See also Pet. at 20; *O'Riordan v. Long Island Bd. of Realtors®, Inc.*, 707 F.Supp. 111, 116 (E.D.N.Y. 1988) ("plaintiff has made no showing that there was any sort of market in boards of real estate dealers.")

[17] (Pet. at 19a) A valid tying claim is stated where there is active *or potential* competition in the tied product market. *Rosebrough Monument Co. v. Memorial Park Cem.*, 666 F.2d 1130, 1142 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

Id. at 19 (citations omitted). The separateness of products is an issue of fact, for the trier of fact. *Id.* at 23.

Plaintiffs have demonstrated ample evidence of two separate "products".

> In the case at hand, all of the relevant evidence submitted on the question of whether there are two separate product markets indicates that the market for professional affiliation is separate from the market for multilist services. For example, there is evidence that the bill for joining the Realtors® is separate from Metro's bill; that a broker can join the Realtors® and choose not to use the multilist service; that, within Atlanta, there are at least two professional groups competing for members; that some local Realtor® groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors® who imposed the Realtor® membership requirement; and that in other markets, multi-list services are independent of professional membership. . . .

(Pet. App. at 14a-15a, decision of the Eleventh Circuit)[18] All of this evidence, and more,[19] demonstrates

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[18] The evidence also reflects members or would-be members of Metro who do not wish to be Realtors®. (Pet.App. at 19a)

[19] The Realtors® themselves have made plain that they consider Realtor® membership and MLS access to be separate "products."

> "A requirement to participate in a Multiple Listing Service in order to gain and maintain REAL-

precisely that there is consumer demand for separate real estate professional association memberships. *See Jefferson Parish.*

Even if Petitioners' functional relation test were the law of the land, the record casts severe doubt on Petitioners' assertions. The mere existence of multiple Realtor® boards in the Atlanta area, any one of which will satisfy Metro's requirement, suggests that there is no one-to-one tie between the product offered by Metro and the product offered by DeKalb. The continued functioning of First Multiple Listing Service in part of the Atlanta market as a non-Realtor® service (Undisputed Facts ¶ 84), and of other non-Realtor® MLS's in other markets, belies Defendants' sweeping assertion that Metro needs a tie-in with the Realtors® .[20] Independent listing service "products" stand on their own, without regard to the Realtors®.

> TOR® membership is an inequitable limitation on its membership."
>
> When a Multiple Listing Service is available, is well operated and properly organized, it is the duty of the REALTOR® to consider thoroughly whether he can serve the best interests of his clients by participating in it. The decision, however, must be his own. As a REALTOR®, it is possible for him to conduct his business in an ethical and efficient manner without participating in a Multiple Listing Service. Therefore, his participation must not be a requirement of REALTOR® membership.

National Association of Realtors Official Interpretation No. 1 (Adopted Nov. 15, 1960); see also Interpretation No. 2 (Adopted January 24, 1961) (local board initiation fee must be separate from any MLS fee).

[20] Even the Realtors® have occasionally been realistic enough

2. There Is No Conflict With *Waste Mgt.* or *Syufy*.

Contrary to Petitioners' assertions, there is no conflict between the Eleventh Circuit's decision and either *United States v. Waste Mgt., Inc.*, 743 F.2d 976 (2d Cir. 1984); or *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), on the issue of good will as a barrier to market entry. Petitioners artificially attempt to create such a conflict by mischaracterizing the decision below. Petitioners assert without basis that the Eleventh Circuit held "that proof that Metro had engendered 'good will' was sufficient as a matter of law to establish a barrier to entry." Pet. at 21.

This assertion is belied by the opinion below, at the very page to which Petitioners refer:

> In short, there is a **material issue of fact** as to whether the defendants have the necessary market power. There is evidence in the record suggesting that there are few realistic substitutes, that there are entry barriers to the market, and that Metro may not have any competitors.

Pet. App. at 18a (emphasis supplied). Thus the ruling below is not a ruling "as a matter of law."

Equally important, the Eleventh Circuit did not misapprehend the forcing power requirement. That

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to recognize this proposition. A Realtor® -affiliated MLS in Oregon settled an antitrust suit on terms that permitted applicants to join without becoming Realtors® as well. *United States v. Multiple Listing Service*, No. CV-72-68 (D.Ore.), cited in *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F.Supp. 111, 116 (E.D.N.Y. 1988). See also *People v. National Ass'n of Realtors*, 120 Cal.App.3d 459, 127 Cal.Rptr. 728 (1981) (striking down Realtor® membership requirement as a matter of law).

court correctly noted that forcing power requires a showing of entry barriers to the tying product market, and found an issue of fact presented on this record as to the existence of such entry barriers. Pet. App. at 18a.

That finding is well supported. The record substantiates that in order to compete effectively with Metro, a new multiple listing service would have to offer the same measure of participation by area brokers, so that the service would carry comparable numbers of property listings, and would interest comparable numbers of brokers assisting buyers. (R.4-40 Exh., Venable Aff. at ¶ 14) Thus, to compete effectively with Metro in its market, it is not sufficient for a new multiple listing service simply to offer comparable facilities in terms of computer terminals, lock boxes, "sold books" and other tangible items. (*Id.* at ¶ 13) In addition, it must generate a critical mass of listings with which to compete. Acquiring such a critical mass is an almost impossible task for a prospective entrant into the same geographic market as Metro, however, because of the pre-existing loyalties of the present members of Metro, and the near impossibility of persuading the membership generally to abandon Metro and its critical mass of listings, for an upstart without such a critical mass. (*Id.* at ¶ 15)

These are not just theoretical concepts. These barriers to entry have precluded at least one effort to compete with Metro. In 1989, an entrepreneurial broker committed to the substantial capital outlay which was required to start up a competing MLS. *Id.* at ¶ 18. He proposed to offer MLS services better and more cheaply than did Metro, in southside metropolitan Atlanta. (*Id.* at ¶¶ 16, 17) He found, however,

that the size, bargaining strength and tactical maneuvering of Metro and its associated Realtors® were prohibitive barriers to entry. (*Id.* at ¶¶ 21, 23)

The record thus provides material evidence that Petitioners' facility is not readily duplicable. The facts of record are further supported by analysis of the market function of MLS's:

> One may expect that, in the case of most multiple listing services, the service will strive toward market dominance. As we have shown, the primary incentive to form a multiple listing service comes from the drive to overcome the market imperfections inherent in the real estate industry. These imperfections are overcome in direct proportion to the service's ability to attract sellers and brokers to bring their listings to it. *Thus, at least in theoretical terms, the larger the service, the more effectively it may operate.* And, of course, the more the service strives toward this goal, the greater the danger of anticompetitive exclusions becomes.

United States v. Realty Multi-List, 629 F.2d 1351, 1373 n.42 (5th Cir. 1980) (emphasis supplied). Conversely, "the formation of a separate competing service can only serve to perpetuate some degree of market imperfection." *Id.* at 1374 n.44. As a result, "MLS's rarely compete with each other." FTC Report at 118. Petitioners' representative conceded that Metro's success is measured "by the number of Realtors® that want our service." (R.3-35 Exh., Ebert depo., 10/19/89, at 47) See also Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L.Rev. 1326, 1357 (1970).

The Court of Appeals used the term "good will" as short hand, not inclusive of all entry barriers shown on this record. The single most important fact relevant to entry barriers is the "critical mass" of customers which a new MLS must accumulate to start business, quite apart from the physical needs of operation. This market is in stark contrast to those in both *Waste Mgt.*, 743 F.2d at 982 ("A person wanting to start in the trash collection business can acquire a truck [and] a few containers. . . ."); and *Syufy*, 903 F.2d at 667 ("rough-and-tumble industry, marked by easy market access. . . .").

Because the Eleventh Circuit treated market power, including barriers to entry, as a factual issue—not an issue of law, as Petitioners insist—and because the record contains ample factual support, there is no conflict between the decision below and those of the Second and Ninth Circuits.

C. There Is No Principled Appellate Conflict.

Finally, Petitioners argue for a less direct conflict in principle among the courts of appeals. Petitioners argue that satisfaction of the rule of reason inherently precludes review of the same conduct under the *per se* tying rule; and impliedly, that this Court should grant review to establish that principle. But Petitioners provide no relevant citation to a court of appeals decision so holding, and thus establish no conflict. Furthermore, recently this Court has already established that conduct which may survive inquiry under the rule of reason may nevertheless be tested under a *per se* approach. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 n.19 (1990) (even if group boycott authorized under rule of rea-

son, same conduct was forbidden by separate *per se* prohibition against price fixing).

Split-level analysis makes special sense here because the two Sherman Act claims apply to different harms. The group boycott claim looks solely at the market for multiple listing services. Resulting exclusion harms both excluded brokers, who lack access to a critical market tool; and consumers, who have access to fewer participating brokers, and thus may pay more. *United States v. Realty Multi-List*, 629 F.2d 1351, 1370-71 (5th Cir. 1980).[21]

But Petitioners have not simply established internal access requirements for Metro. They also have required that all applicants join a separate trade association, as a condition of access to their multiple listing system.[22] That conduct directly injures competition in the separate market for professional membership associations. *Per se* tying analysis is appropriate for such harm to a separate competitive

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[21] See also L. Sullivan, Antitrust, at 255-956 (1977); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1326, 1330-31, 1341-43 (1970). Hence Petitioners' assertion that their Realtor® membership requirement is solely about "efficiency," with no impact on consumer welfare, is without foundation.

[22] Petitioners hint that they should not be subject to *per se* analysis on the sole ground they are a membership organization. But Metro is not a professional membership organization. In any event, trade associations are fraught with potential for anticompetitive conduct as well as occasional procompetitive benefits. Furthermore, when trade groups attempt to manipulate markets other than their own membership by methods subject to *per se* attack, they clearly are subject to *per se* treatment. See *FTC v. Superior Court Trial Lawyers Ass'n, supra; United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950).

market. *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).[23]

III. Petitioners Show No Novel, Important Question of Law Which This Court Should Settle.

Petitioners have also asserted other miscellaneous arguments to support this Court's review but, none with any merit:

Petitioners contend that this case should be held for the Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, No. 90-1029. The issue in *Kodak*, however, is whether a tying violation can ever occur in a single brand "aftermarket," where a defendant original equipment manufacturer lacks market power in the original equipment market. In this case, there is no such "aftermarket" issue presented, and whether Petitioners have the requisite "market power" is an unresolved factual issue for trial. The Court's decision in *Kodak* will not have any impact on the issues raised in the Petition.

Petitioners also argue that the "practical impact" of the ruling below is sufficient reason to grant review, asserting that "virtually all [Realtor®-affiliated] multilist services" will be affected. (Pet. at 25) The

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[23] Moreover, tying claims are unique among *per se* claims in the burdens imposed upon plaintiffs, thus the scope of freedom left to defendants. *Per se* tying requires market power. *Jefferson Parish, supra.* Finally, this case presents no factual grounds for reconsidering the *per se* approach to tying claims. As the Eleventh Circuit demonstrated in its separate discussion of the rule of reason, Petitioners show no justification for the Realtor® membership requirement as a matter of law. Nor have Petitioners presented any compelling reason why the *per se* standard, which this Court has used for decades, should be abandoned.

Court of Appeals, however, very carefully treated the predominant issues as factual matters, recognizing the summary judgment posture of the case. Most obviously, neither Metro nor any other Realtor®-affiliated MLS will be affected by the Eleventh Circuit ruling unless it possesses market power. If such a group does possess market power, then the MLS *should* change its practices, given the competitive harms outlined in *Realty Multi-List*.

Any change in practices does not require radical restructuring, despite Petitioners' contentions. Petitioners may choose between maintaining their current structure and allocating a small portion of fees for Realtor® services to non-Realtor® participants in Metro; or providing relevant services directly through Metro or through other organizations.

The experience in California and at least one local Realtor® board in Oregon shows that MLS's can and do survive the demise of their Realtor® membership requirements, and continue to provide valuable services to their exchange participants at a cost which reflects their services and only their services.[24] The experience of non-Realtor® MLS's also shows the same potential.[25] Petitioners' cries of "practical impact" do not justify review.[26]

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[24] See, *e.g.*, FTC Report at 126 (a California MLS relies upon American Arbitration Association in disputes with non-Realtors®).

[25] Undisputed Facts ¶ 84 (independent MLS without Realtor® membership requirement).

[26] Petitioners also suggest that the Eleventh Circuit's ruling somehow does violence to the Justice Department's antitrust enforcement policy, yet provide no written policy statement from

IV. Supreme Court Review Of This Action Is Premature.

This case is not ripe for review. The Eleventh Circuit remanded to the district court. (App. at 30a) "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

The effect of the Eleventh Circuit's ruling was merely to reverse summary judgment, leaving this case subject to trial on the factual issues. The need for this Court's review may be obviated by a trial. Certiorari is premature.

V. CONCLUSION

Because Petitioners have shown no relevant conflict between the result below and decisions of this Court or the courts of appeals; because Petitioners have not shown any other significant ground for certiorari; and because certiorari is premature in any event; the writ should be denied.

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either the Justice Department or the FTC. Petitioners cite no recent instance of express ratification of a Realtor® membership requirement for MLS access. Indeed, in *United States v. Multiple Listing Service*, No. cv-72-68 (D.Ore.), cited in *O'Riordan, supra*, 707 F.Supp. at 116; the consent decree required abandonment of just such a requirement.

Respectfully submitted,

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Dated February 10, 1992

APPENDIX

Petitioners' Answers to Interrogatories:

16.

The benefits and services provided by the DeKalb Board to its members include:

1. Public recognition and use of the REALTOR® trademark.
2. Education—at least six programs are provided annually. For example, Equal Opportunity, Contract Writing, motivational type programs, etc.
3. Legislation—reviews, and keeps members informed of all legislation affecting real estate, and consults with elected officials regarding matters affecting real estate.
4. REALTORS® political action—supports political candidates who understand the free enterprise system and concerns of REALTORS® and property owners.
5. Monthly business—conducts monthly meetings, except during June, July and August, to inform members of critical issues within the industry and information relative to day-to-day real estate activities.
6. Provides an extensive real estate library for its members which includes sales information, plat books, audio-visual materials (films, cassettes, tapes), floodplain maps, etc.
7. Publishes monthly trade magazine.
8. Awards recognition for outstanding individual accomplishments, including a Million Dollar Club for members who have excelled in the industry by selling more than a million dollars worth of real estate.
9. Promotes membership in the DeKalb Young Council of REALTORS® .
10. Young Council of REALTORS® —a committee of the Board organized for the purpose of providing

a training ground for young REALTORS® ,to develop and expand capabilities of its members to assume leadership roles. This group has educational programs, civic projects, and assists the DeKalb Board in its activities.

11. DeKalb Chapter of Women's Council—designs educational programs to assist members in their career, encourages leadership roles, builds a support system nationally, encourages business referrals, encourages active participation in the local, state and national associations, and promotes the Code of Ethics.
12. Public Relations—promotes annual American Home Week to inform the general public of the REALTOR® family which is constantly working within the community for the free enterprise system, and private property rights.
13. Provides the opportunity to participate in the Metro Listing Service, a wholly owned subsidiary of the DeKalb Board of REALTORS® .
14. Provides social functions to enhance camaraderie and provides networking opportunities which enforces the good working relationship between members.
15. Adopt-A-School Program—enforces the relationship between the Realtor® and the community, improving the REALTOR® image for all members.
16. Provides annual Broker Workshop to better educate the Broker who will, in turn, educate and assist the agents associated with the Broker's firm.
17. Commercial Counsel Listing Exchange provides a method of disseminating information of a commercial nature to other commercial brokers.
18. Equal Opportunity—works closely with the CHRB to provide information and education on the civil rights laws; signing of the Affirmative Marketing

Agreement; polices possible violations in the area of Fair Housing and Civil Rights.

19. Provides HUD posters and ad[] slicks for equal opportunity in housing advertising for broker offices.
20. Conducts a monthly four and a half hour orientation program for new applicants.
21. Professional Standards—provides a means of arbitrating disputes in lieu of litigation, thus saving court costs and attorney's fees; promotes Code of Ethics to which every member must adhere; enforces its Code of Ethics among the members.
22. Realtor® MarketPlace—a wholly-owned subsidiary of the DeKalb Board of REALTORS® .This retail store provides one-stop shopping and carries items needed and most commonly used by real estate agents for their day-to-day activities, including signs, daily planners, pens, cameras, film, books, brochures, etc.
23. Keeps members informed on local sign ordinances.
24. Provides an opportunity for its members to participate at their trade association through its 33 committees.
25. Provides members with information of services provided by GAR and NAR.
26. Works closely with the Chamber of Commerce and DeKalb Developers.
27. Provides members with a DeKalb Board Orientation Packet.

17.

The Georgia Association of REALTORS® serves 159 counties, 54 Boards of REALTORS® ,and 22,000 individual members. As a member of the Georgia Association of REALTORS® , the DeKalb Board of REALTORS® members benefit from the following services by GAR:

1. Legislative—GAR employs a full-time lobbyist to monitor legislation of concern to homeowners, prospective purchasers and the industry at large. GAR maintains a high profile in the legislative process.
2. GAR has access to legal information throughout the state to assist its members with legal matters, including citation to applicable legislation.
3. GAR works closely with the Georgia Real Estate Commission which polices the integrity of the industry in dealing with the public.
4. GAR provides Georgia real estate manuals, books on contract stipulations, etc., at a much reduced publication cost to its members. A new Georgia real estate manual is provided to every Realtor® broker in Georgia free of charge.
5. GAR provides its own credit cards at a discount for use by its members.
6. GAR provides insurance benefits with group rates on major medical, errors and omissions coverage, income protection, Medicare supplement, accidental death and disability coverage, and term life insurance.
7. GAR provides education throughout the state with Outreach courses provided to local Boards.
8. GAR provides G.R.I. designation in Georgia REALTORS® Institute.
9. GAR provides an extensive library with materials for its members.
10. GAR provides a Speakers Bureau for Board programs.
11. GAR conducts two state meetings per year to bring together leadership in its membership to make decisions on policies and planning goals to enhance networking throughout the state.
12. The good public image of REALTORS® across the State of Georgia.

13. GAR publishes a monthly periodical for its members.
14. GAR provides a scholarship foundation which provides scholarships to members to enable them to participate in courses for professional designations.
15. GAR provides various brochures for agents' use on subjects such as safety, advertising, and utilization of library facilities.
16. GAR provides a forum at conventions for education and sharing of information.
17. The Professional Standards Committee conducts training programs for the local Board Professional Standards Committee members.
18. Membership opportunity in the GAR Young Council of Realtors® Committee and the Georgia Chapter of Women's Council.
19. GAR conducts annual Executive Officer Seminars to educate the local Board Executive Officers and elected Secretaries.

18.

NAR represents 54 State associations of REALTORS® which include the fifty states, District of Columbia, Guam, Puerto Rico and the Virgin Islands, as well as approximately 1,854 local Boards and approximately 800,000 members. NAR provides an office in Washington, D.C. (in addition to its headquarters in Chicago, Illinois) for the purpose of legislative activities and lobbying for home ownership rights. Members of the DeKalb Board of REALTORS® receive or benefit from the following activities and services by NAR:

1. NAR provides the largest real estate library in the world.
2. NAR provides a product service catalog containing extensive real estate material to be used by

REALTORS® in their day-to-day activities, such as brochures, farming tools, public relation aids, etc.

3. NAR provides material to state and local Boards for community projects and public relation materials.
4. NAR provides extensive training materials in the way of handbooks and workbooks for Board leadership, committee chairmen and executive officers, such as budgeting and financial control handbooks, membership recruitment and retention kits, community service project guides, and affirmative marketing handbooks.
5. NAR provides equal opportunity training manuals and administrative policy manuals.
6. NAR provides educational programs which permit members to attain professional designations such as MAI, CCIM, CPM, CRB, CRS, LTG, etc.
7. NAR publishes a monthly industry magazine and a bi-weekly newspaper informing its members of current issues relating to real estate.
8. NAR works with HUD in the area of fair housing and civil rights, and develops procedures contained in the affirmative marketing agreement.
9. NAR informs its members regarding tax issues and FTC regulations.
10. NAR conducts training sessions on the Code of Ethics for state and local professional standards chairmen.
11. NAR provides a one-week training session for Board Executive Officers.
12. NAR conducts three national membership meetings per year which allow grass roots input and participation in NAR. Trade shows are held at each national meeting to inform the REALTORS® of services and products available.
13. NAR engages national speakers for educational purposes to benefit its members.

14. NAR promotes and safeguards the REALTOR® membership logo and permits use of the REALTOR® trademark by members.
15. NAR sets guidelines and policies for multiple listing services operated by the local Boards of REALTORS® .
16. NAR is involved with international policies regarding real estate practices, and provides an Economics and Research Department for use by REALTOR® members.
17. NAR provides consultants, computer hardware and computer software for a computerization of local and state offices.